

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

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US BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:

W.R. GRACE & CO., et al.

Debtors.

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Chapter 11

Case No. 01-01139 (JJF)

Jointly Administered

Hearing Date: August 2, 2001 at 1:00 p.m.

**LIMITED OBJECTION OF THE OFFICIAL UNSECURED CREDITORS'
COMMITTEE TO THE APPLICATION OF THE ASBESTOS PROPERTY
DAMAGE COMMITTEE FOR ORDER AUTHORIZING RETENTION OF
CONWAY, DEL GENIO, GRIES & CO., LLC AS FINANCIAL ADVISOR
AND INVESTMENT BANKER (DOCKET NO. 572)**

TO THE HONORABLE JOSEPH J. FARNAN,
UNITED STATES DISTRICT COURT JUDGE:

The Official Unsecured Creditors' Committee (the "Creditors' Committee") of the Debtors, by its counsel, as and for its Limited Objection to the application (the "Application") by the Asbestos Property Damage Committee (the "PD Committee") for an order authorizing the retention of Conway, Del Genio, Gries & Co., LLC ("CDG") as its financial advisor and investment banker (the "Proposed Retention") respectfully represents.

PRELIMINARY STATEMENT

As a general matter, the Creditors' Committee does not object to the PD Committee's retention of a financial advisor and investment banker, or to its choice of CDG as the professional to perform those services. The Creditors' Committee does, however, object to the terms of the proposed retention because the PD Committee's Application seeks the preapproval of a flat monthly fee pursuant to Section 328(a) of the Bankruptcy Code, thereby precluding the Court from reviewing the compensation sought by CDG based on its reasonableness, and

developments not capable of being anticipated at the time of fixing of such terms and conditions [of retention].” 11 U.S.C. § 328(a). Thus, this Court is being asked at the outset of these Chapter 11 cases to approve a fixed retention rate, and the Debtors’ estates to bear that expense, without the ability to determine whether the results in these cases, and the performance of this particular financial advisor, warrant such compensation. The Creditors’ Committee therefore submits that the terms of the proposed retention must be modified to ensure that (i) the Court, the Creditors’ Committee and the other parties in interest in these cases can review CDG’s request for compensation based on a reasonableness standard, (ii) CDG is fairly but not overly compensated for the services it renders to the PD Committee, and (iii) CDG prepares and submits detailed time records of the services its professionals render in the course of CDG’s engagement in these cases.

BACKGROUND

1. On April 2, 2001 (the “Petition Date”), each of the Debtors filed voluntary petitions for reorganization under chapter 11 of the Bankruptcy Code and have continued in the management and operation of their business and property pursuant to sections 1107 and 1108 of the Bankruptcy Code. Pursuant to an order of the Court, the Debtors’ Chapter 11 cases have been procedurally consolidated and are being jointly administered.

2. On April 12, 2001, the United States Trustee appointed the Creditors’ Committee, the PD Committee and an asbestos personal injury committee (the “PI Committee”). On June 18, 2001, the United States Trustee appointed an equity security holders’ committee.

3. By order dated June 21, 2001, this Court approved the retention of FTI/Policano & Manzo (“FTI P&M”) as financial advisor to the Creditors’ Committee pursuant to section 327

of the Bankruptcy Code. FTI P&M is to be compensated for the services it renders on behalf of the Creditors' Committee based on the time spent computed on its normal hourly rates. FTI P&M submits time records of the services rendered by each of its personnel. FTI P&M's compensation will be reviewed by this Court and parties in interest under the reasonableness standard of section 330 of the Bankruptcy Code.

4. Similarly, this Court, on June 13, 2001, approved the retention of L. Tersigni Consulting, P.C. ("L. Tersigni") as accountant and financial advisor to the PI Committee pursuant to sections 327(a) of the Bankruptcy Code. L. Tersigni is to be compensated for the services it renders on behalf of the PI Committee on an hourly basis according to its standard hourly rates as described in its retention application. L. Tersigni's compensation will be reviewed by this Court and parties in interest under the reasonableness standard of section 330 of the Bankruptcy Code.

5. Last, by order of this Court dated May 3, 2001, The Blackstone Group, L.P. ("Blackstone") was approved as financial advisor to the Debtors pursuant to sections 327 and 328 of the Bankruptcy Code. By the terms its employment, Blackstone receives a monthly fee of \$175,000, subject to decrease should Blackstone's activity in connection with its retention significantly diminish. Furthermore, pursuant to the Court's order approving Blackstone's retention, Blackstone is to fully comply with, and is subject to, the Administrative Fee Order entered in these cases by this Court. In addition, Blackstone is required to file interim and final fee applications subject to the procedures set forth in the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware. Last, Blackstone is also required to keep its time in half-hour increments. Notwithstanding the retention of Blackstone pursuant to section

328, the Court's order approving the retention provided that the proposed restructuring fee aspect of Blackstone's compensation is expressly subject to review under the reasonableness standard.

Terms of the Proposed Retention

6. The PD Committee seeks to retain CDG as financial advisor and investment banker and to compensate CDG with a flat monthly advisory fee of \$150,000 for the first twelve months of the engagement; after which the fee would be reduced to \$100,000 per month. See Letter Agreement from CDG to Mr. Darrell W. Scott, dated 6/15/01 at 2 (hereinafter, the "Letter Agreement"). In addition, the Application requests that the Proposed Retention be approved nunc pro tunc to April 27, 2001, the date on which CDG began performing work for the PD Committee.¹ See Application, at ¶ 11.

7. As reported in the Application, CDG's services on behalf of the PD Committee would include, among other things:

- (a) Performing due diligence on the Debtors, including evaluating financial data, capital structure, operating trends and market conditions, and historical transactions;
- (b) Working with other professionals serving the PD Committee in investigating and evaluating possible avoidance claims that may be available to the estate;
- (c) Evaluating business plans and financial projections prepared by the Debtors, including any cash flow projections, long term or short term business plans;
- (d) Assessing proposals made by the Debtors or others;

¹ The Application and the Letter Agreement also provide for the Debtors to indemnify CDG for its activities in these cases. Upon information and belief, that aspect of the CDG retention has been removed and is not being sought. In addition, while neither the Application nor the Letter Agreement state that CDG will prepare and submit interim and final fee applications to the Court, counsel for the PD Committee has confirmed to us that CDG will submit such applications.

- (e) Performing valuation analyses and review of capital structure issues, including debt capacity;
- (f) Evaluating the credit quality and valuation of various forms of distribution which might comprise creditor recoveries;
- (g) Assisting the PD Committee in negotiations with various parties;
- (h) Render expert testimony as required by the PD Committee;
- (i) Such other financial advisory services as may be requested from time to time.

Letter Agreement, at 1-2.

OBJECTION

CDG's Retention Should Not Be Approved Pursuant to Section 328(a) of the Bankruptcy Code

8. The Creditors' Committee objects to the Proposed Retention pursuant to § 328(a) of the Bankruptcy Code. Pursuant to § 328(a) of the Bankruptcy Code, the standard of review by this Court is limited to "improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions [of retention]." 11 U.S.C. § 328(a). Thus, this Court is being asked at the outset of these Chapter 11 cases to approve a fixed monthly retention rate for an unlimited period of time, without the ability to determine whether the results in these cases, and the performance of the particular financial advisor, warrant such a fee.

9. The Creditors' Committee submits that if CDG is to be retained, any fee structure must be subject to review of this Court, taking into account, among other things, the results obtained, the contribution of the respective professional, and with respect to the final fee application, the amount of fees already earned by such professional throughout the course of these cases.

10. Preapproval of a flat monthly fee, not subject to review on a reasonableness standard is particularly inappropriate in these Chapter 11 cases. Given the breadth and

magnitude of the asbestos-related claims which appear likely to be asserted against these estates, and the likely scope of the litigation over issues of fact as evidenced from the Debtors' case management motion and the responses received thereto, it appears that there may very well be significant periods of time when investment banking and financial advisory services are not substantial and the focus will be on the asbestos-related claims litigation. The Creditors' Committee, therefore, submits that requiring these estates to bear the cost of effectively locked-in flat fees which are not subject to review and modification based on a reasonableness standard is inappropriate.

11. Unlike retentions approved pursuant to §§ 327 or 1103 and 330 of the Bankruptcy Code, which are subject to a reasonableness standard of review after the services have been rendered, fee structures approved under § 328(a) of the Bankruptcy Code at the outset of a proceeding are determined to be reasonable only at the beginning of a chapter 11 case. A party challenging the granting of fees approved under § 328 may do so *only* upon a showing that the terms of the fee agreement were "improvident in light of developments not capable of being anticipated at the time [the fee structure was approved]." 11 U.S.C. 328(a); see also In re Westbrooks, 202 B.R. 520, 522 (Bankr. N.D. Ala. 1996) ("Instead of the reasonableness standard, in § 328 pre-approval cases, the standard of review to be used in the § 330 hearing is one of improvidence."). Indeed, as courts have concluded, "[i]f the bankruptcy court pre-approves the terms of the appointment [of the professional], it does not have the power to make a 'reasonableness' review." Pitrat v. Reimers (In re Reimers), 972 F.2d 1127 (9th Cir. 1992) cited in In re Westbrooks, 202 B.R. at 522. Courts that have preapproved a professional's terms of employment under Section 328(a) are required to allow the agreed upon fees, pursuant to Section 330, unless unpredictable facts or circumstances take place after the Court approves the fee. See

In re Olympic Marine Servs., Inc., 186 B.R. 651 (Bankr. E.D. Va. 1995). As such, the standard of review imposed by § 328 necessarily calls for close scrutiny and considered judgment before approval of a fee structure, because this structure is subject to modification only upon a fee application in which the moving party must bear the heavy burden of showing that the pre-approved fee terms were “improvident.”

12. Accordingly, the Creditors’ Committee submits that if CDG is to be engaged, that the retention be approved subject to the Court’s review pursuant to §§ 327, 1103 and 330 of the Bankruptcy Code, on a reasonableness standard of review, and not an “improvidence” standard under § 328. In this manner, the entitlement to a flat monthly fee for twelve months and a reduction thereafter is a matter to be considered by the Court with the participation of all parties in interest when fair determinations of CDG’s contributions to the case can be properly made. Furthermore, under § 327, these determinations would be based on the professionals’ actual, not speculative, contribution to a successful restructuring. Thus, the monthly payment of fees to CDG would be subject to the same close scrutiny of the Court and other parties in interest as the fees of the other professionals in this case.

CDG Should Be Compensated Based On Its Actual Hourly Rate

13. As noted earlier, the financial advisors and investment bankers for both the PI Committee and the Creditors’ Committee will be compensated in these Chapter 11 cases based on the services they rendered computed on hourly rates. In addition, while the Debtors’ financial advisor, Blackstone, will receive a flat monthly fee of \$175,000, Blackstone is obligated to file monthly applications, including time records, in compliance with the Court’s Administrative Fee Order in addition to filing interim and final fee applications. Further Blackstone’s fee is subject to decrease by the Debtors after a six month review.

14. The Creditors' Committee submits that the amount and terms of compensation proposed to be provided to CDG should be modified to also limit the proposed initial \$150,000 fee to the first six months of the case. The amount and terms of CDG's compensation should then be revisited based on the circumstances of these Chapter 11 cases and further discussion. Modification of the Proposed Retention in this manner would serve to bring it in line with the other financial advisor retentions that have been approved up to this point in these proceedings.

15. In addition, the Application provides no information with respect to whether CDG will provide time records in increments for review by this Court and other parties in interest. The Creditors' Committee respectfully submits that the heightened scrutiny that such a review process requires should be instituted in the Proposed Retention in order to insure that CDG's retention remains in the best interests of the estate.

16. Finally, the Application proposes that CDG's retention be nunc pro tunc to April 27, 2001, and accordingly, that CDG become entitled to receive the monthly fee amount commencing on that date. The Application, however, makes no mention of, let alone describes, what services CDG has rendered from April 27, 2001 to the present, and does not provide time records to evidence the services rendered, so as to warrant immediate payment of over \$300,000. No amounts should be paid to CDG until it complies with the procedures established by the Administrative Fee Order.

17. The Creditors' Committee accordingly respectfully submits that clarification of these final points is required before an order authorizing retention of CDG can be entered.

WHEREFORE, the Creditors' Committee requests entry of an order (i) denying the Proposed Retention, unless the terms of the retention are modified in a manner consistent with the concerns raised herein, and (ii) granting such other relief as is just and proper.

Dated: Wilmington, Delaware
July 30, 2001


Respectfully submitted:

STROOCK & STROOCK & LAVAN LLP

Lewis Kruger, Esq.
Robert Raskin, Esq.
(Members of the Firm)
180 Maiden Lane
New York, New York 10038-4982
(212) 806-5400

and

DUANE, MORRIS & HECKSCHER LLP


Michael R. Lastowski, Esq. (DE I.D. No. 3892)
William S. Katchen, Esq.
1100 North Market Street, Suite 1200
Wilmington, Delaware 19801
Telephone: (302) 657-4900
Facsimile: (302) 657-4901
Email: mlastowski@duanemorris.com

**Attorneys for the Official Unsecured
Creditors' Committee**

In re:)	Chapter 11
)	Case No. 01-01139 (JJF)
W. R. GRACE & CO., <u>et al.</u> ¹)	
)	
)	Jointly Administered
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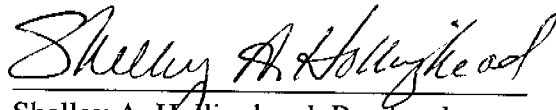
I, Shelley A. Hollinghead, certify that I am not less than 18 years of age, and that service of a copy of the **Limited Objection of the Official Unsecured Creditors' Committee to the Application of the Asbestos Property Damage Committee for Order Authorizing Retention of Conway, Del Genio, Gries & Co., LLC as Financial Advisor and Investment Banker (Docket No. 572)** was made July 30, 2001, upon:

All of the parties indicated on the attached Service List by first class mail, postage prepaid, or as otherwise indicated.

WLM\148189.1

Under penalty of perjury, I declare that the foregoing is true and correct.

July 30, 2001

A handwritten signature in cursive script, reading "Shelley A. Hollinghead". The signature is written in dark ink and is positioned above a horizontal line.

Shelley A. Hollinghead, Paralegal
Duane, Morris & Heckscher LLP
1100 North Market Street, Suite 1200
Wilmington, DE 19801-1246
Phone: (302)-657-4924
Facsimile: (302)-657-4901
Email: sahollinghead@duanemorris.com

W. R. Grace 2002 Service List
Case No. 01-1139 (RJN)
Doc. No. 22588
July 30, 2001
23 – Hand Delivery
08 – Overnight Delivery
156 – First Class Mail

(Counsel to Debtors and Debtors in Possession)

Laura Davis Jones, Esquire
David Carickhoff, Esquire
Pachulski, Stang, Ziehl, Young & Jones
919 North Market Street, 16th Floor
P.O. Box 8705
Wilmington, DE 19899-8705

(Counsel to Debtors and Debtors in Possession)

Hamid R. Rafatjoo, Esquire
Pachulski, Stang, Ziehl, Young & Jones
10100 Santa Monica Boulevard, Suite 1100
Los Angeles, CA 90067-4100

Hand Delivery

(Copy Service)

Parcels, Inc.
Vito I. DiMaio
10th & King Streets
Wilmington, DE 19801

Hand Delivery

(Local Counsel to DIP Lender)

Steven M. Yoder, Esquire
The Bayard Firm
222 Delaware Avenue, Suite 900
P.O. Box 25130
Wilmington, DE 19899

Hand Delivery

(Local Counsel to Asbestos Claimants)

Matthew G. Zaleski, III, Esquire
Campbell & Levine, LLC
1201 N. Market Street
Chase Manhattan Centre, 15th Floor
Wilmington, DE 19801

Hand Delivery

William H. Sudell, Jr., Esquire
Eric D. Schwartz, Esquire
Morris, Nichols Arsht & Tunnell
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899

Hand Delivery

(Counsel for The Chase Manhattan Bank)

Mark D. Collins, Esquire
Deborah E. Spivack, Esquire
Richards, Layton & Finger, P.A.
One Rodney Square
P.O. Box 551
Wilmington, DE 19899

Hand Delivery

Jeffrey C. Wisler, Esquire
Michelle McMahon, Esquire
Connolly Bove Lodge & Hutz LLP
1220 Market Street, 10th Floor
Wilmington, DE 19899

Hand Delivery

(Counsel for Ingersoll-Rand Fluid Products)

Francis A. Monaco, Jr., Esquire
Walsh, Monzack and Monaco, P.A.
1201 N. Orange Street, Suite 400
P.O. Box 2031
Wilmington, DE 19801

Hand Delivery

(Counsel for Ingersoll-Rand Fluid Products)

Frederick B. Rosner, Esquire
Walsh, Monzack and Monaco, P.A.
1201 N. Orange Street, Suite 400
Wilmington, DE 19801

Hand Delivery

(Counsel for Property Damage Claimants)
Michael B. Joseph, Esquire
Theodore J. Tacconelli, Esquire
Ferry & Joseph, P.A.
824 Market Street, Suite 904
P.O. Box 1351
Wilmington, DE 19899

Hand Delivery

Bruce E. Jameson, Esquire
Prickett, Jones & Elliott
1310 King Street
P.O. Box 1328
Wilmington, DE 19899

Hand Delivery

Mark S. Chehi
Skadden, Arps, Slate, Meagher & Flom LLP
One Rodney Square
P.O. Box 636
Wilmington, DE 19899-0636

Hand Delivery

Joseph Grey, Esquire
Stevens & Lee
300 Delaware Avenue, Suite 800
Wilmington, DE 19801

Hand Delivery

(Counsel to Official Committee of
Unsecured Creditors)
Michael R. Lastowski, Esquire
Duane, Morris & Heckscher LLP
1100 North Market Street, Suite 1200
Wilmington, DE 19801-1246

Hand Delivery

Laurie Selber Silverstein, Esquire
Monica Leigh Loftin, Esquire
Potter Anderson & Corroon LLP
1313 N. Market Street, 6th Floor
P.O. Box 951
Wilmington, DE 19899

Hand Delivery

Mary M. MaloneyHuss
Wolf, Block, Schorr and Solis-Cohen LLP
920 King Street, Suite 300
One Rodney Square
Wilmington, DE 19801

Hand Delivery

Selinda A. Melnik, Esquire
Smith, Katzenstein & Furlow LLP
800 Delaware Avenue
P.O. Box 410
Wilmington, DE 19899

Hand Delivery

Curtis Crowther, Esquire
(Counsel for Century Indemnity Company)
White and Williams LLP
824 North Market Street, Suite 902
P.O. Box 709
Wilmington, DE 19801

Hand Delivery

(Counsel for Wachovia Bank, N.A.)
Adam G. Landis, Esquire
Klett Rooney Lieber & Schorling
1000 West Street, Suite 1410
Wilmington, DE 19801

Hand Delivery

(Counsel for First Union Leasing)
John D. Demmy, Esquire
Stevens & Lee, P.C.
300 Delaware Avenue
8th Floor, Suite 800
Wilmington, DE 19801

Hand Delivery

(Counsel for Potash Corp.)
Aaron A. Garber, Esquire
Pepper Hamilton LLP
1201 Market Street
Suite 1600
Wilmington, DE 19899-1709

Hand Delivery

(Counsel for Entergy Services, Inc.)
Eric Lopez Schnabel, Esquire
James H. Joseph, Esquire
Klett Rooney Lieber & Schorling
The Brandywine Building
1000 West Street, Suite 1410
Wilmington, DE 19801

Hand Delivery

(Zonolite Attic Litigation Plaintiffs)
William D. Sullivan, Esquire
Eluzon Austin Reardon Tarlov & Mondell,
P.A.
300 Delaware Avenue, Suite 1700
P.O. Box 1630
Wilmington, DE 19899

Overnight Delivery

(Counsel to Debtor)
James H.M. Sprayregen, Esquire
James Kapp, III, Esquire
Kirkland & Ellis
200 East Randolph Drive
Chicago, IL 60601

Overnight Delivery

(United States Trustee)
Frank J. Perch, Esquire
Office of the United States Trustee
601 Walnut Street, Curtis Center,
Suite 950 West
Philadelphia, PA 19106

Overnight Delivery

(Canadian counsel for Debtor)
Derrick Tay, Esquire
Meighen Demers
Suite 1100, Box 11
Merrill Lynch Canada Tower
200 King Street West
Toronto
Ontario
Canada M5H 3T4

Overnight Delivery

(W. R. Grace & Co.)
David B. Siegel
W.R. Grace and Co.
7500 Grace Drive
Columbia, MD 21044

Overnight Delivery

(Official Committee of Personal Injury
Claimants)
Elihu Inselbuch, Esquire
Rita Tobin, Esquire
Caplin & Drysdale, Chartered
399 Park Avenue, 36th Floor
New York, NY 10022

Overnight Delivery

(Official Committee of Unsecured
Creditors)
Lewis Kruger, Esquire
Stroock & Stroock & Lavan LLP
180 Maiden Lane
New York, NY 10038-4982

Overnight Delivery

(Official Committee of Property Damage
Claimants)
Scott L. Baena, Esquire
Member
Bilzin Sumberg Dunn Baena Price &
Axelrod LLP
First Union Financial Center
200 South Biscayne Blvd, Suite 2500
Miami, FL 33131

Overnight Delivery

(Equity Committee Counsel)
Thomas Moers Mayer, Esquire
Kramer Levin Naftalis & Frankel LLP
919 Third Avenue
New York, NY 10022

First Class Mail

(Counsel to Sealed Air Corporation)
D. J. Baker, Esquire
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, NY 10036

First Class Mail

(Counsel to DIP Lender)
J. Douglas Bacon, Esquire
Latham & Watkins
Sears Tower, Suite 5800
Chicago, IL 60606

First Class Mail

(Counsel to Asbestos Claimants)
Nancy Worth Davis, Esquire
Ness, Motley, Loadhold, Richardson &
Poole
28 Bridgeside Boulevard
P.O. Box 1792
Mount Pleasant, SC 29465

First Class Mail

Todd Meyer, Esquire
Kilpatrick Stockton
1100 Peachtree Street
Atlanta, GA 30309

First Class Mail

)
Office of Reorganization
Securities & Exchange Commission
Suite 1000
3475 Lenox Road, N.E.
Atlanta, GA 30326-1232

First Class Mail

District Director
IRS
409 Silverside Road
Wilmington, DE 19809

First Class Mail

)
Michael A. Berman, Esquire
Securities and Exchange Commission
450 Fifth Street, N.W. (Mail Stop 6-6)
Washington, D.C. 20549

First Class Mail

Secretary of Treasurer
P.O. Box 7040
Dover, DE 19903

First Class Mail

Secretary of State
Division of Corporations
Franchise Tax
P.O. Box 7040
Dover, DE 19903

First Class Mail

James D. Freeman, Esquire
U.S. Department of Justice
Environmental Enforcement Section
999 18th Street
Suite 945-North Tower
Denver, CO 80202

First Class Mail

Jon L. Heberling, Esquire
McGarvey, Heberling, Sullivan &
McGarvey PC
745 South Main Street
Kalispel, MT 59901

First Class Mail

Patrick L. Hughes, Esquire
Haynes & Boone LLP
1000 Louisiana Street, Suite 4300
Houston, TX 77002-5012

First Class Mail

David S. Heller, Esquire
Latham & Watkins
Sears Tower, Suite 5800
Chicago, IL 60606

First Class Mail

Charles E. Boulbol, Esquire
26 Broadway, 17th Floor
New York, NY 10004

First Class Mail

Ira S. Greene, Esquire
Squadron, Ellenoff, Plesent & Sheinfeld,
LLP
551 Fifth Avenue
New York, NY 10176

First Class Mail

James A. Sylvester, Esquire
Intercat, Inc.
104 Union Avenue
Manasquan, NJ 08736

First Class Mail

Steven J. Johnson, Esquire
Gibson, Dunn & Crutcher LLP
1530 Page Mill Road
Palo Alto, CA 94304-1125

First Class Mail

Charlotte Klenke, Esquire
Schneider National, Inc.
P.O. Box 2545
3101 S. Packerland
Green Bay, WI 54306

First Class Mail

David S. Rosenbloom, Esquire
Jeffrey E. Stone, Esquire
Lewis S. Rosenbloom, Esquire
McDermott, Will & Emery
227 West Monroe Street
Chicago, IL 60606-5096

First Class Mail

Brad Rogers, Esquire
Office of the General Counsel
Pension Benefit Guaranty Corp
1200 K. Street, N. W.
Washington, D.C. 20005-4026

First Class Mail

Pamela Zilly
Richard Shinder
David Blechman
Michael Alexander
The Blackstone Group
345 Park Avenue
New York, NY 10154

First Class Mail

Josiah Rotenberg
Lazard Freres & Co. LLC
30 Rockefeller Plaza, 60th
New York, NY 10020

First Class Mail

(Counsel for The Chase Manhattan)
Stephen H. Case, Esquire
Nancy L. Lazar, Esquire
David D. Tawil, Esquire
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017

First Class Mail

Jan M. Hayden
William H. Patrick
Heller, Draper, Hayden, Patrick & Horn,
L.L.C.
650 Poydras Street, Suite 2500
New Orleans, LA 70130-6103

First Class Mail

Joseph F. Rice
Ness, Motley, Loadholt, Richardson &
Poole
28 Bridgeside Blvd.
P.O. Box 1792
Mt. Pleasant, SC 29465

First Class Mail

Nancy Worth Davis
Ness, Motley, Loadholt, Richardson &
Poole
28 Bridgeside Blvd.
P.O. Box 1792
Mt. Pleasant, SC 29465

First Class Mail

(Counsel for Asbestos Claimants)
Steven T. Baron, Esquire
Member
Silber Pearlman, LLP
2711 North Haskell Avenue, 5th Floor, LLP
Dallas, TX 75204

First Class Mail

Bankruptcy Administration
IOS Capital, Inc.
1738 Bass Road
P.O. Box 13708
Macon, GA 31208-3708

First Class Mail

(Attorneys for PPG Industries, Inc.)
W.J. Winterstein, Jr., Esquire
John J. Winter, Esquire
William M. Aukamp, Esquire
Eleven Penn Center, 29th Floor
1835 Market Street
Philadelphia, PA 19103

First Class Mail

R. Scott Williams
PMG Capital Corp.
Four Falls Corporate Center
West Conshohocken, PA 19428-2961

First Class Mail

Alan R. Brayton, Esquire
Brayton & Purcell
222 Rush Landing Road
Novato, CA 94945

First Class Mail

Jonathan W. Young
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive, Suite 3000
Chicago, IL 60606-1229

First Class Mail

Russell W. Budd
Alan B. Rich
Baron & Budd, P.C.
3102 Oak Lawn Avenue, P.O. Box 8705
Dallas, TX 75219

First Class Mail

Shelby A. Jordan, Esquire
Nathaniel Peter Holzer, Esquire
Jordan, Hyden, Womble & Culbreth, P.C.
500 N. Shoreline Blvd., Suite 900
Corpus Christi, TX 78471

First Class Mail

Courtney M. Labson, Esquire
The Mills Corporation
Legal Department
1300 Wilson Boulevard, Suite 400
Arlington, VA 22209

First Class Mail

T. Kellan Grant
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive, Suite 3000
Chicago, IL 60606-1229

First Class Mail

Cindy Schultz
Ingersoll-Rand Fluid Products
One Aro Center
P.O. Box 151
Bryan, OH 43506

First Class Mail

Alan Kolod, Esquire
Moses & Singer LLP
1301 Avenue of the Americas
40th Floor
New York, NY 10019-6076

First Class Mail

Mr. Thomas Moskie
Bankers Trust Company
Four Albany Street
Fourth Floor
New York, NY 10006

First Class Mail

John P. Dillman, Esquire
Linebarger Heard Goggan Blair
Graham Peña & Sampson, LLP
P.O. Box 3064
Houston, TX 77253-3064

First Class Mail

Charles E. Gibson, III
Attorney at Law
620 North Street, Suite 100
Jackson, MS 39202

First Class Mail

Paul M. Baisier, Esquire
SEYFARTH SHAW
1545 Peachtree Street
Suite 700
Atlanta, Georgia 30309

First Class Mail

Kevin D. McDonald
Wilshire Scott & Dyer, P.C.
One Houston Center
1221 McKinney, Suite 4550
Houston, Texas 77010

First Class Mail

Christopher Beard, Esquire
Beard & Beard
306 N. Market Street
Frederick, MD 21701

First Class Mail

Bernice Conn, Esquire
Robins, Kaplan, Miller & Ciresi LLP
2049 Century Park East, Suite 3700
Los Angeles, CA 90067

First Class Mail

Steven R. Schlesinger, Esquire
Jaspan Schlesinger Hoffman LLP
300 Garden City Plaza
Garden City, NY 11530

First Class Mail

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(Counsel to Official Committee of
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(Counsel for numerous asbestos claimants)
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(Counsel for Berry & Berry)
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(Counsel for SAP America, Inc.)
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New York, NY 10004-1490
(Counsel for Wells Fargo Bank Minnesota,
National Association)

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(Counsel for Wells Fargo Bank Minnesota,
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Department of Attorney General
Revenue Division
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Bernard J. Bonn III, Esquire
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Senior Counsel
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Speights & Runyan
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Shaw Gussis Domanskis Fishman & Glantz
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Kramer Levin Naftalis & Frankel LLP
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New York, NY 10022

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(Attorney General of PA)
(Commonwealth of PA, Dept. of Revenue)
Christopher R. Momjian
Senior Deputy Attorney General
I.D. No. 057482
Office of Attorney General
21 S. 12th Street, 3rd Floor
Philadelphia, PA 19107-3603